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Old and New Type Bar Exams

Melvin Nord*

BAR EXAMS ARE INTENDED TO PROTECT the public by insuring that only competent persons are licensed to practice law.

What comprises competency, however, is a difficult question to answer; and how competency is to be determined is even more difficult. As with most difficult questions, the usual approach has been simply to ignore them and "play it by ear." The result has been bar exams in many states which are of marginal value to the public and which have at the same time been extremely unfair to the applicants.

Bar Exams—Marginal Value

That bar exams have been of marginal value to the public is indicated by the fact that in most states they merely *postpone* the entrance of nearly every applicant into the legal profession, rather than *barring* virtually anyone from practicing law. To the extent that this is so, it is difficult to conclude that much has been accomplished, other than forcing the applicant to "cram" his mind full of miscellaneous information which will not permanently stay with him. At the same time, it is extremely difficult to believe that those who are admitted are sufficiently competent to enter immediately into practice on an unsuspecting public. A client will no doubt expect his lawyer to be "totally familiar" with all the practical aspects of law practice, such as the minutiae of trial and appellate practice, substantially all the substantive laws of general significance, the local peculiarities of law, and the tax consequences of various activities. While most applicants admitted to practice law no doubt have the *ability* to understand these things (reminiscent of the test of legal capacity to make a will), the fact is that when they enter the practice of law they are grossly deficient in *knowledge* of many (if not all) of these, and can accordingly work great injury when let loose on the public. Without attempting to suggest any cure for this problem at this point, I merely suggest here that neither the law schools nor the bar exam authorities make much of an effort to meet or even recognize these problems. Both of them do what they do merely because of inertia. It is easier for them to continue doing what they have been doing than to determine what they should be doing.

However, whatever deficiencies one can point to with regard to law school preparation, it can hardly be denied by any objective observer that the job they have been doing is magnificent as compared to the job many bar exams have been doing. It's not that the law schools have been doing such good work; rather, it's that many bar exams have been intolerably bad.

To begin with, there is very wide disagreement among states as to what subjects belong on the exams. For example, some states figure that "bailments" is a subject worthy of being on the exam, while taxation is

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not. Some states examine on a tremendous number of subjects (or even an *unlimited* number since they reserve the right to examine on *any* subject), while others limit themselves to as few as eleven subjects. It is clear that the public would like to be certain that the applicant is familiar with more than merely the "giant" subjects; hence there is the desire to examine on *many* subjects. On the other hand, examining on a great many subjects causes the *depth* of examination in each subject to shrink towards superficiality; and, in addition, it places a ridiculous premium on *memory*, particularly on the ability to "cram" a great deal of unassimilated matter temporarily into the mind (and to discharge it immediately thereafter). In fact, this is one of the most unsatisfactory aspects of bar exams.

Furthermore, this unsatisfactory situation is made much worse by the use of *essay* questions, as has been the principal practice in nearly all states in the past. These nearly always cover only a relatively few points in the law of a subject (at least if there are only one or two such questions on a given subject on the exam), thus making the exam a "hit-or-miss" affair, and introducing a large element of Russian roulette into the exam. The fact that the questions usually must be relatively short in duration (since there are so many subjects to be covered) also tends to amplify this "hit-or-miss" aspect of the exam. And since bar exam questions in most states are not made up by *law professors*, but by *lawyers* who may not feel totally competent to form conclusive opinions as to the law without a specific case or cases to rely on as authority, the exam questions tend to come down to actual cases rather than hypothetical cases. Actual cases, however, rarely contain more than one or two issues on the same subject. Thus, in most states the questions in any given subject tend to raise an extremely minute fraction of the legal issues with which the applicant should be familiar, and these are rarely *basic* issues since those are the ones which are the least litigated. Thus, the applicant will generally find it necessary to prepare to meet not only the major points of law in each subject, but rather the *whole gamut* of possible issues, in order not to miss the few trivial ones which may actually appear on the exam! This is grossly unfair to the student, in addition to being an extremely inaccurate gauge of his competency.

In addition, experience has indicated that bar examiners often tend to concentrate on relatively recent cases decided in their own jurisdiction—even when they adamantly insist that they are not examining on local law. While there is nothing wrong with examining on local law (in fact, as I have indicated above, it seems to be the main reason for giving bar exams in the first place), it is unfair to the student to tell him to answer by general law and then to grade him on the basis of one local case. No doubt the examiners believe the local cases they select are really in accordance with the general law, but experience teaches that the bar examiners often are unaware of the difference between the law as set forth in general treatises (and as taught in law schools), and the local cases before them. Furthermore, one local case is not necessarily the law, even of that jurisdiction, since conflicts

among decisions within a given state are not unheard of. In addition, experience also indicates that bar examiners either lack sufficient confidence in their own authoritativeness to allow their Model Answers to be made public or else, if they do release them, they are often full of monumental errors.

In short, my sixteen years of experience with bar exams convinces me that current bar exams are, with few exceptions, absolutely indefensible. They should either be greatly *improved* or else be *abolished* altogether, as they are of little value and work injustice on many applicants.

Bar Exam Reform

That is not to say that some testing procedure independent of the law schools is unnecessary. Rather, as indicated above, I believe that law schools are currently not doing as good a job as they should; and this would undoubtedly be made worse if they were not subjected to a further check on their "products" by someone else. It is just that the present bar exams are in most states virtually useless as a check on the law schools. In addition, if the basic function is to check on the performance of the law schools as "producers" of lawyers, it is unfair to "punish" the *applicants* several years after they have passed required subjects in law school and graduated. By that time, it is too late for either the applicant or the law school to do anything about it—as well as too difficult to pinpoint the source of the trouble. Thus, the pressure does not feed back to the law schools and to individual professors, where it belongs.

Furthermore, how can one ever conclude, for example, that the subject of Corporations was poorly taught in a certain law school in a certain year, when the students will be examined a couple of years later on a half dozen points of law? A much better procedure for checking on the performance of law schools would be to allow students to take statewide tests—or national tests—on each subject each year as they finish studying it, instead of all in one fell swoop after they graduate. This would make it possible to give more comprehensive exams on each subject, as well as instantly pinning the responsibility for poor teaching where it belongs.

There is, in fact, at present a growing movement to change the nature of bar exams. A new "multi-state" (prospectively nationwide) exam will begin to be given in 1972 in several states, covering 5 of the basic subjects (the rest to be covered separately by each participating state as it deems fit). These exam questions will all be multiple-choice objective questions, similar to those which have been in use in Florida for several years. Experience with such questions on the Florida bar exam has indicated that they are not limited to stereotyped bare legal questions, but can be so written as to require legal analysis of fact situations similar to mini-essay questions. One great advantage of these questions is that the scope of coverage is much greater in, say, forty objective questions on Contracts, than in a few essay questions; thus the exam is much less "hit-or-miss" and hence much fairer. In addition, if the questions are well prepared by outstanding authorities on the law, and screened

and analyzed by professionals skilled in such examining techniques, as is the case in Florida, and as will be the case in the new "multi-state" exam, one can be more certain that the answers will be correct, and that subjective elements in grading (the bane of essay questions) will be eradicated. One can also be certain that trivial questions will disappear, since no question can be asked to which the answer is doubtful! Another by-product of this technique of testing will be the elimination of the advantages to persons who are skilled in writing, opposed to those who might be much better in oral presentation of a case in court to a jury. Still another by-product will be that the results will be available much more quickly than at present (at least insofar as these particular questions are concerned).

Thus, the new "multi-state" exams will be enormously fairer than the old exams, at least insofar as they go (since the rest of the exam in most states will continue to be of the old variety). However, they will introduce some problems of their own.

In the first place, since *absolutely unqualified answers* are required in such objective questions, it follows that there must be some definite answer. Unless local law is explicitly required, therefore, the answer must be based on *general law*—not *local law*. In the "multi-state" exams now to be given, it is definitely envisaged that there will be *absolutely no local law* on these questions, since they will all be automatically graded by a computer programmed with identical answers, regardless of the states in which the questions have been used. While this is beneficial, insofar as excluding local cases of doubtful validity, it raises the question: *why it is worth asking these questions at all in a bar exam?*

Such an examination does not tell us whether an applicant is competent to practice law in a particular state. It would seem appropriate to give these questions subject-by-subject each year as the student completes his study of them (as indicated above), leaving for the last stage a local exam concentrating on points of local and practical importance. This could be a relatively short exam; and it could be based on a specific syllabus of what the applicant is required to know (as is done in Ohio), such as listing the statutes and court rules which the student must know. It is also possible that passing the "national" part of the exam might ultimately be accepted in all states as one of the requirements for practice (and thus interchangeably useful to the applicant if he wants to move to another state later), to be supplemented by also passing the "local" part of the exam.

The new "multi-state" exam, as presently envisaged, can be expected to prove advantageous to the "national" law schools, as opposed to the schools specializing in local law. However, if the exam were to be administered as I have suggested, this disadvantage of the local law schools would be eliminated, and the interests of both the applicants and the public would also be better served.

There remains, however, the problem of whether the present type of instruction in law schools will or should ultimately be affected by the objective question approach. It seems to me that it would ultimately

require law schools to abandon any tendency they may still have to teach that there are no "answers" to legal issues, but only attitudes and approaches. In my opinion, this tendency of some law professors is harmful to the average law student and to the public, and really ought to be dropped. One cannot turn out a lawyer who doesn't really know *anything for certain*. His clients will need to know some things—at least with substantial certainty—in order to make plans. I submit that if law schools don't fight this new type of bar exam, but adapt to meet its needs, they will turn out lawyers who really know something which their clients expect them to know, instead of being afflicted with the common disease of lawyers of thinking that *saying* (or arguing) something makes it so.

There really are laws—rules which are supposed to govern people's conduct—and it is necessary for the lawyer (to say nothing of the public itself) to know them. If there is "no law"—just attitudes or approaches—why *teach* "law"? That is not law, but sophistry.